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86-156

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

OPRY FELTON LOWE,
Petitioner

VS

UNITED STATES OF AMERICA,
Respondent

On Appeal from the United States Court
of Appeals for the Eleventh Circuit

Petition for Certiorari -- Criminal Case

Jim Hudson
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P. O. Box 8068
Athens, Georgia 30603
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Questions Presented

Did the Court of Appeals err in allowing the District Court to admit into evidence a prior conviction of a co-defendant without a mandatory, on-the-record hearing to determine whether its introduction was more probative than prejudicial?

Did the Court of Appeals err in holding that the District Court did not abuse its discretion by admitting the opinion testimony of a lay witness on the Petitioner's state of mind and illegal intent?*

---

*The parties to the proceeding in the United States District Court were Hinton R. Pierce and J. Michael Faulkner, State Attorneys for the Southern Judicial Circuit in and for the State of Georgia. Petitioner herein, and John David Davis, Robert Lee Anderson, and Ronnie Berg Mills, co-defendants with petitioner in the District Court.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

OPRY FELTON LOWE,
Petitioner

VS

UNITED STATES OF AMERICA,
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Petition for Certiorari -- Criminal Case

OPINION BELOW

The opinion of the Court of Appeals below (App. A., p. 1A) is reported in 787 F. 2d 1501. The opinion of the District Court below (App. E., p. 27A) was not reported.

JURISDICTION

The judgment of the Court below (App. B., p. 21A) was entered on April 28, 1986. Rehearing was sought and denied. The

jurisdiction of this Court in invoked under 28 U.S.C. 1254 (1).

STATUTES INVOLVED

The statutes under which petitioner was prosecuted, through nothing turns on their terms, are the following: 18 U.S.C. §2, 21 U.S.C. §841 (a)(1), 21 U.S.C. §846, 21 U.S.C. §952 (a), and 21 U.S.C. §963. (See App. F., p. 34A-38A, for full texts of statutes.)

STATEMENT OF THE CASE

A. Course of proceedings in the case now before this Court.

On December 7, 1984, in a case then pending in the United States District Court for the Southern District of Georgia, Augusta Division, entitled United States v. Davis, Criminal No. 184-28, petitioner was found guilty by a jury on an indictment of six counts charging violation of 21 U.S.C. §841 (a)(1), Food and Drugs (1982); 21 U.S.C. §846; 21 U.S.C. §952(a); 21 U.S.C. §963; and 18 U.S.C. §2, Crimes and Criminal Procedure (1982), for the years 1978 through 1982. (App. F., pp. 34A-38A).

On January 30, 1985, the District Court entered judgment and petitioner was sentenced to ten years imprisonment, five years special parole and fined $50,000. This judgment and sentence was affirmed by

the Court of Appeals for the Eleventh Circuit, United States v. Davis, No. 85-8289, 787 F. 2d 1501 (1986). (App. B., p. 20A). A rehearing by the Court of Appeals for the Eleventh Circuit was denied on July 4, 1986. Petitioner is currently serving his sentence.

B. **Relevant facts concerning the underlying conviction for conspiracy to import and to possess with intent to distribute controlled substances and with aiding and abetting the importations of controlled substances.**

The relevant facts are contained in petitioner's brief to the Court of Appeals for the Eleventh Circuit (App. H., pp. 48A-54A). During petitioner's criminal trial in the District Court, the Government and defense entered into a stipulation. (App. H., p. 52A). The Government agreed not to introduce

evidence of the prior conviction of a co-defendant, John David Davis. During Davis' incarceration for this prior conviction, he spent time in the federal prison with Larry Douglas Evans, who later directed the drug smuggling scheme allegedly participated in by the defendants. (App. H., p. 54A). In return, the petitioner agreed to waive his objections to the introduction of prior consistent statements made by convicted conspirator Larry Douglas Evans. (App. H., p. 52A). The defense further agreed not to introduce any character witnesses (App. H., p. 53A).

On cross-examination, however, the Government violated the stipulation by introducing Davis' 1966 conviction for conspiring to possess untaxed distilled spirits. (App. H., p. 54A). The petitioner objected, (App. H., p. 54A),

but the District Court overruled the objection and allowed the damaging testimony. (App. A., p. 6A). The District Court reasoned that Davis first breached the stipulation by giving "misleading" answers to questions from the defense on whether he conspired to possess or import "illegal substances" and on his past association with Larry Douglas Evans. (App. A., p. 7A). The Court of Appeals on appeal, stated that the District Court properly allowed the Government to breach the stipulation and ask about Davis' prior conviction to correct the "false impression" and "misstatements" (App. A., p. 8A) made in Davis' answers to questions asked by the defense.

Also during petitioner's criminal trial, the District Court admitted into evidence certain opinion evidence by one of the Government's witnesses. Noel

Vandiver, a pilot, testified that the petitioner told him that he knew a person who would pay Vandiver money if Vandiver "wanted to make a trip." (App. A., p. 16A). Over objection by the defense, the Government asked Vandiver what he thought petitioner meant by that question. (App. A., p. 16A). Vandiver replied that he thought the petitioner was referring to an illegal act. (App. A., p. 17A). The District Court allowed Vandiver's testimony to stand. (App. A., p. 18A). On appeal, the Court of Appeals stated that Fed. R. Evid. 701 allowed for the admission of lay opinion testimony if the opinion of the witness is based on a rational perception of the witness and is helpful to a clear understanding of his testimony on the determination of a fact in issue. (App. A., p. 17A). The Court of Appeals further stated that the

District Court did not abuse its discretion in allowing the testimony. (App. A., p. 18A).

The trial in the District Court lasted two weeks. The jury deliberated for more than eleven hours before finding petitioner guilty on all counts. (App. G., pp. 39A-47A).

EXISTENCE OF JURISDICTION BELOW

Petitioner was accused of committing crimes against the United States. He was convicted in the District Court for the Southern District of Georgia of six counts of conspiring to import and possess (with intent to distribute) controlled substances and with aiding and abetting the importation and possession of controlled substances under 21 U.S.C. §841 (a)(1), 21 U.S.C. §846; 21 U.S.C. §952 (a); 21 U.S.C. §963; and 18 U.S.C. §2. (App. F., p. 34A).

REASONS FOR GRANTING THE WRIT

The Court of Appeals has sanctioned a lower court's departure from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision.

The Court of Appeals refused to grant Petitioner a new trial on the basis that the District Court's admission of damaging testimony on two specific occasions was in error. Relevant case law, however, indicates that the District Court erred, first by failing to make a mandatory on-the-record determination of the probative value of admitting a prison conviction into evidence for impeachment purposes and second by abusing its discretion in admitting the opinion testimony of lay witness on the Petitioner's state of mind.

I. The Decision Below is in Conflict with the Decision of Another Court of Appeals on the Same Issue.

During Petitioner's trial in the District Court, testimony on co-defendant Davis' prior conviction was used to impeach a witness, Davis himself. Before admitting into evidence any prior conviction under Fed. R. Evid. 609 (a)(1), an on-the-record hearing must be held by the District Court in order to determine whether the introduction of the prior conviction was more probative than prejudicial. Such hearings are mandatory. United States v. Preston, 608 F. 2d 626 (5th Cir. 1974) cert. denied, 446 U.S. 940 (1979).

Although Davis' conviction fell under Fed. R. Evid. 609 (b) because it was more than ten years old, the policies underlying Preston apply equally to Rule

609 (b). Furthermore, the Fifth Circuit Court of Appeals recently cited Preston as authority in a case where the conviction was based on evidence admitted under rule 609 (b). United States v. Acosta, 763 F. 2d 671 (5th Cir. 1985).

In Petitioner's case, the Court of Appeals for the Eleventh Circuit refused to acknowledge that the admission of Davis' prior conviction was used for impeachment purposes. Yet in the opinion, the Court of Appeals described Davis' direct testimony concerning illegal substances as creating a "false impression" and as a "misstatement." (App. A., p. 8A). The Court of Appeals then stated that the introduction of Davis' prior conviction by the Government to counter his "false impression" and "misstatement" was not for the purpose of discrediting Davis, but to "establish the

fact that Davis had previously possessed an illegal substance." (App. A., p. 11A).

The Court of Appeals here engages in semantics in describing the use of Davis' prior conviction as "establishing a fact" rather than "impeaching a witness." Davis' prior conviction was obviously introduced to discredit him as a witness, i.e., to impeach him (emphasis added).

The on-the-record determination by the District Court should have been made as required by Preston. It was not. This error was harmful to Petitioner, who was a party to the stipulation between the Government and the defense. Petitioner waived his objections to statements made by convicted conspirator Larry Douglas Evans and gave up his right to present character witnesses in return for the nondisclosure of Davis' prior conviction.

The Petitioner should therefore be granted a new trial.

II. **The Court Below Sanctioned a Lower Court's Departure from Accepted Evidentiary Procedure.**

The Court of Appeals also erred in allowing the District Court to admit into evidence the opinion testimony of lay witness Noel Vandiver. A witness should not be allowed to testify as to his conclusions drawn from facts that he has observed. This is especially true when the conclusions involve another's intent or state of mind. United States v. Ruppel, 66 F.2d 261 (5th Cir 1982). "The admission of opinion testimony about a defendant's state of mind is highly prejudicial and must be avoided." Id. at 270.

Rule 701 of the Federal Rules of Evidence permits a witness to give opinion

testimony when it is "helpful to a clear understanding of his testimony or the determination of a fact in issue." (App. I., p. 55A). Vandiver's testimony does not fall into this category, because his testimony with his opinion was more than sufficient to allow the jury to reach its own conclusion about what Petitioner meant.

Furthermore, Vandiver's opinion testimony about Lowe's illegal intent was particularly inappropriate because it was a conclusion based upon another conclusion that was based upon another conclusion as to Petitioner's intent or state of mind. Such a series of unsubstantiated conclusions do not constitute a rationally based perception of the witness, as required by Fed. R. Evid. 701 (a), but mere speculation. (App. I., p. 55A). While the Court of Appeals suggests that

the "better practice" would have been for the trial court to have disallowed Vandiver's opinion testimony, the Court declined to overrule the District Court on this issue. (App. A., p. 18A).

The trial court abused its discretion in admitting highly prejudicial opinion testimony on Petitioner's state of mind and illegal intent, and the Court of Appeals erred in denying Petitioner a new trial. Because both courts erred in allowing in evidence unsubstantiated opinion testimony from a lay witness, Petitioner should be granted a new trial.

CONCLUSION

In affirming the conviction of four defendants allegedly engaged in a conspiracy to smuggle drugs, the Court of Appeals overlooked the District Court's erroneous admission of two pieces of evidence crucial to the trial of

Petitioner. First, the Court of Appeals refused to acknowledge that the Government used a co-defendant's prior conviction in evidence to impeach that co-defendant. The use of the prior conviction to impeach a witness would have constituted reversible error, since the District Court would have been required to hold a mandatory, on-the-record hearing before admitting the conviction. The District Court held no hearing, and the Court of Appeals, in affirming the lower court's judgment, simply labeled the Government's use of the prior conviction as the correction of a misstatement by the witness.

Second, the Court of Appeals erred in failing to find that the District Court abused its discretion in allowing lay opinion testimony on the Petitioner's state of mind. The opinion testimony of

Noel Vandiver, perhaps the single most damning piece of evidence introduced against Petitioner at trial, was conjectural and without probative value.

The Court of Appeals erred in allowing the District Court to depart from accepted evidentiary procedures during the Petitioner's trial. This petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A.

UNITED STATE OF AMERICA,
Plaintiff-Appellee,

v.

JOHN DAVID DAVIS, ROBERT LEE ANDERSON,
OPRY FELTON LOWE, RONNIE BERG MILLS,
Defendants-Appellants

No. 85-8289

United States Court of Appeals,
Eleventh Circuit

April 28, 1986

Appeal from the United States District Court for the Southern District of Georgia.

Before Vance, Circuit Judge, Henderson*, Senior Circuit Judge, and Lynne**, Senior District Judge.

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*See Rule 3(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

**Honorable Seybourn H. Lynne, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

Henderson, Senior Circuit Judge:

On December 7, 1984, John David Davis, Robert Lee Anderson, Opry Felton Lowe and Ronnie Berg Mills were convicted by a jury in the United States District Court for the Southern District of Georgia of numerous charges arising out of a drug conspiracy. They challenge their convictions on numerous grounds, the most substantial being that the trial judge abused his discretion by admitting a prior conviction of John David Davis. We affirm.

The appellants were charged with participating in a drug smuggling scheme directed by Larry Douglas Evans. The government's case was based almost entirely on the testimony of co-conspirators convicted in the 1983 trial of United States v. Evans, et al., CR

182-41 (S.D.Ga. 1983). Davis was the sheriff of Dawson County, Georgia at the time of his indictment. The government presented evidence that Davis participated in the importation of marijuana to the south Georgia area in June, 1981. Davis also made arrangements for Larry Evans to bribe Sheriff Charles Starrett of Elbert County, Georgia in return for his aid in the importation plan. Robert Lee Anderson was connected by the government's witnesses to the same drug transaction in June, 1981 and to numerous marijuana deals conducted with Larry Evans at a local restaurant. Opry Felton Lowe, a farmer, constructed several airstrips at Evans' behest which were used for drug importation. Ronnie Berg Mills, a former Georgia State Revenue Agent, acted as a lookout for Evans at an airstrip used by aircraft to fly in illegal drugs and also

provided Evans with useful information concerning the surveillance activities of law enforcement officials. All of the appellants were convicted on every count of the indictment in which they were indicted.

The appellants claim that the district court committed reversible error by allowing the government to cross-examine Davis about a previous conviction. They argue that the admission of this evidence violated a stipulation entered into by all of the appellants and the government. They also contend that the court erred as a matter of law by not making an on-the-record finding that the probative value of the conviction outweighed its prejudical impact.

[1] Near the end of the government's case, all four appellants and the

government entered into an agreement whereby the government assented not to offer into evidence Davis' prior 1966 conviction of conspiring to possess non-tax paid whiskey[1] in return for Davis' promise not to call any character witnesses. In addition, the government agreed to refrain from introducing certain evidence of bad acts which had been previously held to be admissible in return for the defendants' concession to withdraw their objections to the introduction of a prior consistent statement made by Larry Evans to his attorney.[2]

---

[1]Davis received a Presidential Pardon in 1971.

[2]The district court previously ruled this statement to be inadmissible.

On direct examination, Davis was asked by his attorney whether he had "ever conspired with anybody to import, possess, or distribute any illegal substance?" Record on Appeal, Vol. 19 at 43. He answered the question negatively. Davis was also asked how often in the past he had seen Larry Evans and he responded "probably two or three times a year." Id. at 17. This testimony was untrue because Davis had seen Evans every day for a period of four months during the time when they were incarcerated together in a federal prison. Before the government began its cross-examination of Davis, the prosecutor notified the court that he intended to ask Davis about his prior conviction. The appellants objected, claiming that any discussion of that conviction violated the stipulation. The district court overruled the objection for

the reason that Davis' misleading answers to the questions regarding his prior conviction and previous association with Larry Evans breached the stipulation.

Before us the appellants contend that Davis did not breach the agreement because his negative answer to the question relating to possession of an "illegal substance" was truthful because his previous conviction constituted a revenue law infraction rather than a possessory violation. We reject this distinction, however, and hold that the district court did not err by concluding that Davis' direct testimony created the false impression that he had never possessed an illegal substance when in fact he had previously been convicted for possession of non-tax paid liquor. Therefore, the court properly allowed the government to

ask Davis about this prior conviction in order to correct that misstatement.[3] In addition, Davis' testimony that he only saw Evans two or three times a year was blatantly false and therefore the government had the right to inquire into his association with Evans in prison.

[2] It is further asserted that the district court erroneously allowed the

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[3]The appellants maintain that the conviction should have been treated as nonexistent because Davis received a Presidential Pardon in 1971. The case they cite for this proposition, however, United States v. Solomon, 686 F. 2d 863 (11th Cir. 1982), merely held that the district court did not abuse its discretion by not admitting into evidence a conviction more than 10 years old for impeachment purposes against a witness. The opinion says nothing about a witness's right to lie about a conviction because he received a pardon from the President. Under the facts of the present case, we find that the government was properly permitted to correct the illusion that Davis presented to the jury that he had never been convicted of possessing an illegal substance.

government to call witnesses to testify that they would not believe Davis under oath. The appellants claim that the parties stipulated that neither side would introduce any character evidence. The district court, however, found that admission of the evidence was proper because the appellants had previously breached the stipulation and because, in any event, nothing in the stipulation prohibited the government from calling witnesses to testify as to whether they would believe Davis under oath. Anderson's Record Excerpts, Tab 10 at p. 8-10. Although the record is ambiguous as to the exact scope of the agreement between the parties, we find that the district court's interpretation of the stipulation must be accorded great deference. Accordingly, we find that the court committed no error when it allowed

the government to call witnesses to impeach Davis' truthfulness.

Error is also assigned for the failure of the district court to make a finding on the record that the probative value of Davis' conviction outweighed its prejudicial impact. The appellants rely on United States v. Preston, 608 F.2d 626 (5th Cir. 1979)[4] to support this proposition. In Preston, the court held that before admitting a prior conviction into evidence for impeachment purposes under Fed. R. Evid. 609 (a)(1), a district court must state on the record that its probative value exceeds its prejudicial

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[4]In Bonner v. City of Prichard, 661 F.2d 1206 (11 Cir. 1981) (en banc), this court adopted as precedent all decisions of the former Fifth Circuit Court of Appeals decided prior to October 1, 1981.

impact. Davis' conviction fell under Fed. R. Evid. 609(b) because it was more than ten years old but the policies underlying the Preston decision seem to apply equally to rule 609(b) and the Fifth Circuit Court of Appeals recently cited Preston as authority in a case where the conviction was based on evidence admitted under Rule 609(b). United States v. Acosta, 763 F. 2d 671 (5th Cir. 1985).[5]

[3] Contrary to the appellants' assertion, Preston is not controlling here because Davis' prior conviction was not used for impeachment purposes but rather to establish the fact that Davis had previously possessed an illegal substance.

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[5]Acosta is not binding upon this court and because of our disposition of this issue we need not decide whether Preston applies to Rule 609(b).

In United States v. Watchmaker, 761 F. 2d 1459 (11th Cir. 1985), the court noted that "[e]vidence of past convictions need not be subjected to [the Preston] restrictions . . . if it is offered for purposes other than impeaching a witness . . . ." In this case, the government asked Davis about the conviction not to cast doubt on his credibility but to dispel the illusion that he gave the jury that he had never possessed an illegal substance. We hold that this use of a prior conviction falls outside the scope of the Preston decision.[6]

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[6]We also find that the district court, did not, as a substantive matter, abuse its discretion by allowing the government to ask Davis about his prior conviction.

[4] Anderson urges that he was entitled to a severance of his trial once the district court allowed the conviction into evidence because he was not responsible for Davis' breach of the agreement yet he was penalized for that breach. Anderson claims that Davis' credibility was crucial to his case because Davis' testimony was favorable to him. The decision to deny a motion for a severance, however, lies within the sound discretion of the trial judge. United States v. Graziano, 710 F. 2d 691, 694 (11th Cir. 1983). To be entitled to a severance, a defendant must show that he will suffer compelling prejudice as a result of being tried with another defendant. United States v. Alvarez, 755 F. 2d 830, 1857 (11th Cir. 1985). Following this standard, we hold that the district court did not abuse its

discretion in finding that the prejudice caused by the breach of the stipulation was not sufficiently compelling to require a severance.

All of the appellants contend that discrepancies in the testimony of the government's witnesses between their grand jury testimony and their trial testimony were suppressed by the government in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L. Ed. 2d 215 (1963). In Brady, the Supreme Court held that the prosecution's failure to disclose exculpatory evidence to the defendant violated due process. This court has subsequently held that the Brady rule does not apply if the evidence in question is available to the defendant from other sources. United States v. McMahon, 715 F. 2d 498, 501 (11th Cir. 1983).

Furthermore, assuming a specific Brady request was made, the failure to disclose favorable evidence results in reversal only if the nondisclosure might have affected the outcome of the case. Id.

[5] The district court, in its order denying the defendants' motion for new trials, did not find any Brady violations because the appellants knew the identities of the government's witnesses prior to trial and had reasonable access to them so that they could have discovered the inconsistent statements. Anderson's Record Excerpt, Tab 10 at 12-13. Moreover, the court found that all of the witnesses were exhaustively cross-examined as to the discrepancies in their testimony and therefore even assuming a Brady violation, the appellants did not suffer any resulting prejudice. Id. Our review

of the record convinces us that both of these findings are correct and therefore these Brady arguments have no merit.[7]

[6] Lowe and Mills fault the district court's admission into evidence of certain opinion evidence by two of the government's witnesses. Noel Vandiver, a pilot, testified that Lowe told him that he (Lowe) knew a person who would pay Vandiver money if Vandiver "wanted to make a trip." Record on Appeal, Vol 15 at 31. The government then asked Vandiver what he thought Lowe meant by the statement and, over objection, Vandiver replied that he

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[7]Lowe specifically complains about an FBI 302 report summarizing witness Vandiver's testimony that Lowe complaint was exculpatory and not disclosed by the government. We have reviewed this report and find that it contains no exculpatory information. See Lowe's Record Excerpts at 71.

thought that Lowe was referring to an illegal act. Id. at 32.

Claude Kilgore, another government witness, testified that Evans told him "you don't have to worry about" Mills. Record on Appeal, Vol 12 at 322. Kilgore was then asked his impression of the meaning of that statement and he responded that he thought Mills must have known about the "dope business." Id. at 323.

Fed. R. Evid. 701 permits lay opinion testimony if the opinion is "rationally based on the perception of the witness and [is] helpful to a clear understanding of his testimony or the determination of a fact in issue." Fed. R. Evid. 701. The admission of opinion evidence will be deemed error only upon a showing of an abuse of the trial court's discretion.

Scheib v. Williams-McWilliams Co., 628 F. 2d 509, 511 (1980).

Lowe and Mills claim that the jury should have been allowed to reach their own conclusions regarding the import of Vandiver's and Evans' statements. Lowe in particular maintains that Vandiver's testimony was highly prejudicial because it corroborated that of Evans who was the main witness against Lowe. Although the better practice might have been for the trial court to disallow the opinion testimony, we cannot say that the court abused its discretion by admitting it. The witnesses' testimony was based on their perceptions of the conversations and the accuracy of those perceptions was a question for the jury. Therefore, we cannot say that it was reversible error to admit the opinion testimony.

The appellants raise numerous other alleged errors. We have carefully considered the entire record and the applicable law pertaining to these issues and find them to be without merit.

The judgments of the conviction are AFFIRMED.

APPENDIX B.

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 85-8289

D. C. Docket No. 184-28

UNITED STATES OF AMERICA,
Plaintiff-Appellee

VS

JOHN DAVID DAVIS, ROBERT LEE ANDERSON, OPRY FELTON LOWE, RONNIE BERG MILLS,
Defendants-Appellants

Appeals from the United States District Court for the Southern District of Georgia

---

Before VANCE, Circuit Judge, HENDERSON*, Senior Circuit Judge, and Lynne**, Senior District Judge.

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*See Rule 3(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

**Honorable Seybourn H. Lynne, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

J U D G M E N T

This cause came to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this court that the judgments of conviction of the said District Court in this case be and the same are hereby, AFFIRMED.

Entered: April 28, 1986
For the Court: Spencer B. Mercer, Clerk

BY: _____
Deputy Clerk

ISSUED AS MANDATE: May 20, 1986 (AS TO DAVIS, ANDERSON & MILLS ONLY)

ISSUED AS MANDATE: June 16, 1986 (AS TO LOWE)

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
NO. 85-8289

UNITED STATES OF AMERICA,
Plaintiff-Appellee

VS

JOHN DAVID DAVIS, ROBERT LEE ANDERSON, OPRY FELTON LOWE, RONNIE BERG MILLS,
Defendants-Appellants

Appeal from the United States District Court for the Southern District of Georgia

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ON PETITION(S) FOR REHEARING
(June 4, 1986)

BEFORE: VANCE, Circuit Judge, HENDERSON*, Senior Circuit Judge, and LYNNE**, Senior District Judge.

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*See Rule 3(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

**Honorable Seybourn H. Lynne, Senior U.S. District Judge for the Northern District of Alabama, sitting by designation.

PER CURIAM: The petition(s) for rehearing filed by Opry Felton Lowe is denied.

ENTERED FOR THE COURT

_____

United States Circuit Judge

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 85-8289

UNITED STATES OF AMERICA,
Plaintiff-Appellee

VS

JOHN DAVID DAVIS, ROBERT LEE ANDERSON, OPRY FELTON LOWE, RONNIE BERG MILLS,
Defendants-Appellants

Appeal from the United States District Court for the Southern District of Georgia

---

O R D E R :

(X) The motion of appellant, Opry Felton Lowe, for [X] stay [] recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

( ) The motion of appellant, Opry Felton Lowe, for [X] stay [] recall and stay of the issuance of the mandate

pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed.

The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

( ) The motion of _____ for a further stay of the issuance of the

mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

( ) IT IS ORDERED that the motion of _____ for a further stay of the issuance of the mandate is DENIED.

_____
UNITED STATES CIRCUIT JUDGE

June 16, 1986

APPENDIX E.

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF GEORGIA

Docket No. CR 184-00028-04

UNITED STATES OF AMERICA,

VS

OPRY FELTON LOWE,
Defendant

VIO: 21:952(a), 963, 841(a)(1) and 18.2

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government; the defendant appeared in person on this date: January 30, 1985

XX WITH COUNSEL - Jim Hudson

XX NOT GUILTY

There being a verdict of guilty.

Defendant has been convicted as charged of the offense(s) of Importation and conspiracy to import controlled

substances, as charged in Count One; possession with intent to distribute controlled substances, as charged in Count Two; importing controlled substances and aiding & abetting, as charged in Counts Eight and Ten; possession with intent to distribute and distribution of controlled substances and aiding & abetting as charged in Counts Nine and Eleven.

The court asked whether defendant has anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of 10 years under the provisions of Title 18, United

States Code, Section 4205(a) and pay a fine to the United States in the sum of $25,000 as to Count One.

As to Count 2, It is ordered that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a period of 10 years under the provisions of Title 18, United States Code, Section 4205(a) and pay a fine to the United States in the sum of $50,000, to run concurrently with the sentence imposed in Count 1.

As to Count 8, It is ordered that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a period of 5 years under the provisions of Title 18, United States Code, Section 4205(a) and pay a fine to the United States in the sum of $5,000, to run concurrently with the

sentence imposed in Counts 1 and 2, and serve a special parole term of 5 years.

As to Count 9, It is ordered that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a period of 10 years under the provisions of Title 18, United States Code, Section 4205(a) and pay a fine to the United States in the sum of $50,000, to run concurrently with the sentence imposed in Counts 1 and 2, and 8.

As to Count 10, It is ordered that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a period of 5 years under the provisions of Title 18, United States Code, Section 4205(a) and pay a fine to the United States in the sum of $15,000, to run concurrently with the sentences imposed in Counts 1 and 2, 8,

and 9, and serve a special parole term of 5 years, to run concurrently with the special parole term in Count 8.

As to Count 11, It is ordered that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a period of 10 years under the provisions of Title 18, United States Code, Section 4205(a) and pay a fine to the United States in the sum of $50,000, to run concurrently with the sentences imposed in Counts 1, 2, 8, 9, and 10.

Total Sentence: 10 years custody of the Attorney General under the provisions of Title 18, United States Code, Section 4205(a), 5 years special parole term, and a fine of $50,000.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends.

U.S. Penitentiary, Atlanta, Georgia

Signed by:

X U.S. District Judge

CHIEF JUDGE, U.S. DISTRICT COURT, SOUTHERN DISTRICT OF GEORGIA 1/30/85

APPENDIX F.

Crimes and Criminal Procedure

18 U.S.C. §2:

"2. **Principals**

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

Food and Drugs

21 U.S.C. §841(a)(1):

"§841. **Prohibited acts A**

Unlawful Acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distributed, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;"

21 U.S.C. §846:

"§846. **Attempt and conspiracy**

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

21 U.S.C. §952(a):

"§952. **Importation of controlled substances**

(a) Controlled substances in schedule I or II and narcotic drugs in schedule III, IV or V; exceptions

It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in Schedule III, IV, or V of subchapter I of this chapter, except that--

(1) such amounts of crude opium, poppy straw, concentrate of poppy straw, and coca leaves as the Attorney General finds to be necessary to provide for medical, scientific, or other legitimate purposes, and

(2) such amounts of any controlled substances in schedule I or II or any narcotic drug in

schedule III, IV or V that the Attorney General finds to be necessary to provide for the medical, scientific, or other legitimate needs of the United States---

(A) during any emergency in which domestic supplies of such substance or drug are found by the Attorney General to be inadequate,

(B) in any case in which the Attorney General finds that competition among domestic manufacturers of the controlled substance is inadequate and will not be rendered adequate by the registration of additional manufacturers under section 823 of this title, or

(C) in any case in which the Attorney General finds that such controlled substances is in

limited quantities exclusively for scientific, analytical, or research uses,

may be so imported under such regulations as the Attorney General shall prescribe. No crude opium may be so imported for the purpose of manufacturing heroin or smoking opium."

21 U.S.C. §963

"§963. **Attempt and conspiracy**

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

APPENDIX G.

Docket Excerpts

United States District Court

for the Southern District of Georgia,

Augusta Division

United States v. Davis

Criminal No. 184-28

V. PROCEEDINGS

1984		
Aug 28	INDICTMENT	ret'd & sealed. warrants & summons issued./bm
Aug 29	MOTION	of govt by determination of bond, sealed & placed in vault./bmm
Aug 30	INDICTMENT JS3	unsealed./bmm
Aug 30	ORDER	setting bond, deft DAVIS at 3 mil, deft ANDERSON at 2 mil. Filed 8/29/84, unsealed this date. cc: attys/bmm

Aug 30	ORDER	bond set as to defts LOWE & ATKINS at $250,000 cash, as to deft MESTER at 2 mil cash. Filed 8/29/84, unsealed this date. cc: attys/bmm
Aug 30	ORDER	to unseal indictment; deft MASTER declared fugitive. cc: attys/bmm
Aug 30	CJA	apptng counsel for deft LOWE./bmm
Aug 30	MOTION	of deft DAVIS for hrng on mot for red of bond./bmm
Aug 31	COMMITMENT	deft LOWE comm Col Co Det Ctr on 8/29/84./bm
Sep 04	ORDER	bond set as to deft LOWE at $175,000. cc: attys/bmm

Sep 04	RETURN	of USM on B/W, deft LOWE arrested 8/29/84./bm
Sep 04	ORDER	bond hrng for deft DAVIS set for 9/7/84. cc: attys/bmm
Sep 06	FINANCIAL AFFIDAVIT	of deft LOWE./bmm
Sep 06	APPEARANCE	of cnsl for deft DAVIS./bmm
Sep 06	MAGISTRATE'S PAPERS	fm S/D Fla, to include, bond, order of removal, waiver of removal hrng, deft ATKINS/bm
Sep 07	MAGISTRATE'S PAPERS	deft ANDERSON, fm N/D GA, to include waiver of removal hrng./bmm
Sep 07	ORDER	to unseal affidavit of S/A F. Wiley, sealed 8/28/84. cc: attys/bmm

Sep 07	NOTICE	of appearance, cnsl for deft ATKINS./bmm
	.....	
Nov 26	STIPULATION	of govt & DAVIS re L. D. Evans./bmm
Nov 26	STIPULATION	of govt & DAVIS re deft Anderson./bmm
Nov 26	TRANSCRIPT	of hrng held before Mag. Dunsmore on 11/8/84./bmm
Nov 27	ORDER	to feed & house jury./bmm
Nov 27	MOTION	in limine of LOWE./bmm
Nov 27	MOTION	in limine of ANDERSON./bmm
Nov 28	REQUEST	to charge by deft DAVIS/jr
Nov 28	TRANSCRIPT	of bond hearing of deft. LOWE, 8/30/84/jr
Nov 30	STIPULATION	an authenticity./bmm
Nov 30	STIPULATION	re C.E. Starrett./bmm

Nov 30	STIPULATION	re Methaqualone./bmm
Dec 03	APPEARANCE	bond for witness J. C. Clark, released to custody of GBI pending completion of trial of this case./bmm
Dec 03	REQUEST	to charged, deft LOWE./bmm
Dec 03	MOTION	of ANDERSON for judgment of acquittal/bmm
Dec 05	REQUEST	of DAVIS to charge of govt./bmm
Dec 05	REQUEST	(suppl) to charge of govt./bmm
Dec 06	ORDER	releasing witness J. C. Clark fm custody of GBI./bmm
Dec 06	COURT'S INSTRUCTIONS	to the jury./bmm
Dec 07	REDACTED	Indictment./bmm

Dec 07	JURY VERDICT	deft DAVIS, Guilty Cts 1,2,3,4,5,10,11/bmm
Dec 07	JURY VERDICT	deft ANDERSON, Guilty Cts 1,2,10,11./bmm
Dec 07	JURY VERDICT	deft MILLS, Guilty Cts 1,2./bmm
Dec 10	AFFIDAVIT	of W. Leon Barfield./bmm

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1985

Jan 03	RESPONSE	of govt to mots of LOWE & MILLS for new trial and appeal bond./bmm
Jan 03	ORDER	granting mot of DAVIS to extend time for sentc. cc: attys/bmm
Jan 15	RESPONSE	of gov. to deft DAVIS' motion for judgment of acquittal and new trial./si

Jan 22	REPORT/ RECOMMENDATION	that voucher in amount of $15,128.18 be approved for payment of Ct. appt'd counsel for deft. MILLS. Clk to submit rept & recom. w/objections 2/5/84. cc: attys/si
Jan 24	ORDER	adopting Mag.'s rept & recom. of 1/22/85 as opinion of Ct. cc: attys/si (EOD: 1/29/85)
Jan 30	SENTENCING	DEFENDANTS PIERCE, ATKINS, DAVIS, MILLS, LOWE & ANDERSON; 10 days after Ct's ruling on mot. for new trial to file notice of appeal./si
Jan 30	JUDGMENT COMMITMENT ORDER	PIERCE: 4 years CAG u/18:4205 (a); 5 yrs prob. u/supervision; $10,000.00 fine. cc: attys/si (EOD: 1/31/85).

Jan 30	JUDGMENT COMMITMENT ORDER	ATKINS: 30 mths CAG u/18:4205 (b)(2); $10,000 fine; 5 yrs probation u/supervision. cc: attys/si (EOD: 1/31/85).
Jan 30	JUDGMENT COMMITMENT ORDER	LOWE: 10 yrs. CAG u/18:4205 (A), 5 yrs special parole, $50,000.00 fine. cc: attys (EOD: 1/31/85)/si
Jan 30	JUDGMENT COMMITMENT ORDER	MILLS: 10 yrs. CAG u/18:4205 (a), $10,000 fine. cc: attys/si (EOD: 1/31/85).
Jan 30	JUDGMENT COMMITMENT ORDER	DAVIS: 30 yrs. CAG u/18:4205 (a), 5 yrs special parole, $150,000.00 fine. cc: attys (EOD: 1/31/80)/si

Jan 30	JUDGMENT	ANDERSON: 25 yrs CAG u/18:4205 (a), 5 yrs special parole, $100,000.00 fine. cc: attys (EOD: 1/31/85)/si
Jan 30	MOTION	of Davis for release pending appeal./si
Feb 06	MOTION	of Gov. to require deposit of fines or posting of bond by defts. pending appeal/si

APPENDIX H.

Excerpt from Brief of Appellant
Opry Felton Lowe to the
United States Court of Appeals
for the Eleventh Circuit
Davis vs. United States
Case No. 85-8289
September 4, 1985

STATEMENT OF THE CASE

The appellant, Felton Lowe, is a farmer. He has for many years owned a bulldozer and done numerous odd jobs with it to supplement his income. He did several such jobs for Doug Evans, the previously convicted leader of the conspiracy in question. This is how Mr. Lowe got entangled in the present case.

Lowe freely admits that he worked for Evans. He levelled off some outdated parallel terraces on a farm in South Carolina (T. VIII 219). This place later became known as the Tate strip. According to Evans, Lowe did not know about the drug

smuggling at this time. (T. VIII 239). He also did some work on a field behind a row of houses in Oglethorpe County. (T. VIII 235). Lowe never made any attempt to hide his work. In fact, he had a heavy equipment company deliver a new bulldozer to the Oglethorpe strip so that he could test drive it. (T. VIII 235).

Lowe also did some work on a farm that he leased by the Broad River. Lowe built up a roadway in order to accommodate a traveller irrigation system and for use in baling hay. (T. VIII 204, 207). Evans later used this roadway to land a couple of planes in 1981 and 1982. (T. III, 215). Lowe did not learn of these landings until after they occurred. (T. III 215, 284). Evans also attempted to land a plane at a field across the street from Lowe's house. Lowe was not present at this time. (T. IV. 274).

Except for Evans, no one ever claimed to have seen Lowe receive large sums of money for his work. None of the other main conspirators knew firsthand if Lowe knew about the smuggling operation. (Ken Summers at T. V. 314, Keith Summers at T. IV. 80, Boyd Tallent at T. V. 128, Paige Prater at T. VIII 104.)

On August 28, 1984, Lowe was indicted for conspiracy to import narcotics under 21 U.S.C. §841 (a)(1), 21 U.S.C. §846, 21 U.S.C. §952, 21 U.S.C. §963 and 18 U.S.C. §2. (R. 21). Before the trial, the defendants moved to adopt each other's motions. (R. 54) The trial court granted this motion. (R. 55) Defense also moved for the production of all Brady and Jencks material. (R. 56). The trial court ordered the pre-trial disclosure of all Brady material but not the Jencks material. (R. 66). The Government

produced its Jencks material seven days before trial. However, the Government failed to include an important FBI report on Noel Vandiver. (R. 71). This report was not produced until after the trial began. As a result, the appellant was unable to prepare an effective defense.

Vandiver's testimony at the trial was very damaging to Lowe's case. He related a conversation that he had with Lowe. According to Vandiver, a pilot, Lowe said, "I can help you make some money if you want to make a little trip." (T. IV. 31). The prosecution asked Vandiver what his impression was of what Lowe was talking about. The defense objected on the grounds that this was inadmissible opinion testimony. (T. IV. 31). Vandiver replied that he thought that Lowe was talking about something illegal because he thought that a large sum of money would be

involved. Vandiver concluded that a large sum of money was involved because he thought that Lowe knew that he was in dire financial trouble. (T. IV. 32). In the conversation itself, no money terms were discussed, nor was there any mention of what the job would entail. At that time, Vandiver was at odds with Lowe over payment of a defective dairy refrigerator unit. Vandiver claimed that Lowe owed him approximately $3,000. (T. IV. 40). Lowe claimed that he did not owe Vandiver anything because the unit was defective and caused the loss of a substantial amount of milk. (T. VIII. 242).

During the trial, the Government and defense entered into a stipulation. (T. VII. 197-198). (R. 76-77). The Government agreed not to introduce evidence of Davis' prior conviction. In return, the defense agreed to waive their

objections to the introduction of prior consistent statements made by Doug Evans. These statements were introduced through the testimony of Hale Almand, Evans' attorney. The trial court had previously ruled that Almand's testimony was inadmissible. (R. 73) (T. VII 168). The defense further agreed not to introduce any character witnesses. Almand testified. (T. VII 208). During Davis' testimony, Davis' attorney asked him several questions pertaining to the facts of the present case and ended by asking Davis the following question: "Have you ever conspired with anybody to import, possess, or distribute any illegal substance?" (T. VIII 43). Davis answered no. Davis also responded that he had seen Evans only three to four times a year. He neglected to mention that he had seen Evans on a daily basis for a couple of

months while they were in prison together. (T. VIII. 16, 17). On cross-examination, the Government violated the stipulation by introducing Davis' 1966 conviction for conspiring to possess untaxed distilled spirits. (T. VIII. 47). The proper objections were made. (T. VIII. 45).

Lowe was found guilty. (R. 112). He is presently out on bond pending this appeal. (R. 115).

The standard or scope of review for all issues is whether the trial court erred in applying a rule of law.

APPENDIX I

Federal Rules of Evidence
for United States Courts and Magistrates
1985

Rule 701

OPINION TESTIMONY BY LAY WITNESSES

If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.